

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON ROBERT SPICER,

Defendant-Appellant.

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UNPUBLISHED

March 16, 2010

No. 281173

Wayne Circuit Court

LC No. 06-009064-01

Before: DAVIS, P.J., and WHITBECK and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

Because I would reverse due to the cumulative effect of errors leading to a failure of due process, I respectfully dissent.

The proofs in this case were complex and, due to an unusual combination of circumstances, defendant was not permitted to present the central aspect of his defense. Defendant's due process rights were even further undermined when, in addition to being barred from presenting testimony central to his case, the prosecution then used the absence of that testimony as a basis to urge the jury to convict.

The events giving rise to this prosecution occurred on July 25, 2006, and the arresting officers' testimony as to these events differed sharply with that of defendant.

The version of events testified to by the police officers was that the two of them were patrolling the subject neighborhood in a "task force car," the purpose of which was to convey a "strong police presence." The officers saw a vehicle occupied by three men drive out of a gas station and noted that the driver was not wearing a seat belt. Given the violation of the seat belt law, the officers signaled the driver to stop and pull over and he promptly complied. The officers then approached the car. Officer Dalitz asked the back seat passenger, Dewann Riggs, to step out of the car and when the passenger did so, Dalitz noticed a bag of what appeared to be crack cocaine on the floor of the back seat. Dalitz then escorted Riggs back to the police car. The other officer, Connor, asked defendant to turn off the car and hand him his keys. Defendant did so and Connor placed the keys on the roof of the car. He then asked defendant to present his driver's license, vehicle registration and proof of insurance. Defendant turned to the person in the front passenger seat and said "get it" at which point that person raised his shirt and revealed a

revolver in his waistband. Connor then drew his gun. Defendant then turned the engine back on and drove away, initially steering towards Connor. The officers got back into their car and drove after the fleeing defendant.

After a chase, during which at some point the front seat passenger got out of the car, defendant finally pulled over, got out of his car, dropped a baggie and attempted to run away. Connor caught up with defendant and defendant punched the officer, who then tackled and handcuffed him. After the arrest, Dalitz searched the car and found a revolver on the front passenger seat and three large bags of cocaine, weighing a total of about 227 grams, and a small bag of marijuana in the trunk. Later, the police found a man walking in the neighborhood and, concluding that he was the front seat passenger who had fled, arrested him.

Defendant's version of events is significantly different. He testified at trial that on the evening in question he was at a friend's home playing video games; that another friend, Riggs, arrived at about 9:00 p.m.; and that, a few minutes later, Jermaine McSween arrived, driving a green Ford Taurus. Following a conversation, defendant, Riggs and McSween decided to go to the store so Riggs could get cigarettes and wine. McSween asked defendant to drive and gave him the keys. McSween sat in the front passenger seat and Riggs sat in the back. En route to the store, defendant stopped for gas and put his seat belt on prior to pulling out from the gas station. Upon leaving the gas station, defendant saw the police car pull in behind the car and he asked McSween if McSween had the paperwork for the car; McSween told him that it was in the glove box. After driving about a block, defendant began to pull over to stop at the store as planned and the police car put its flashers on. Connor asked defendant for his license and the car's registration and proof of insurance. Defendant gave the officer his license and, regarding the other two items, told McSween to get them. Defendant was not asked for his keys and did not give them to the officer or turn off the ignition.

Defendant testified that he did not know that McSween was armed. After telling McSween to get the paperwork out, he turned back to the officer at which point he saw the officer draw his weapon. Defendant looked back at McSween and saw that McSween was holding a gun and pointing it at the officer. McSween yelled that he was going to shoot and the officer pointed his gun into the car and started screaming. Defendant found himself sitting between two men pointing guns and screaming at each other. Fearing he would be shot in the crossfire, defendant panicked and hit the gas. As the car accelerated, McSween pointed the gun at defendant and told him to keep driving or McSween would shoot him. After a time, McSween jumped out of the vehicle. Defendant drove one house further, pulled into a driveway, stopped, and came out with his hands up. He did not attempt to run and, given a prior nerve injury to his left leg, is unable to run. The two officers came running up to him and Connor repeatedly punched him in the face and was cursing at him. A photo of defendant's bruised face taken at the police station was admitted. Defendant testified that he never had any drugs in his possession, never discarded any drugs at the scene, and had no knowledge of the drugs found in the back seat or in the trunk.

The determination of guilt essentially came down to the jury's decision as to whose version of events to believe. Issues of credibility are for the jury. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1988). However, the unusual circumstances of this case skewed the information available to the jury to make that determination. Defendant maintained that the police had fabricated portions of their testimony, including the fact that the man they later

arrested on the street was the front seat passenger. The man arrested was named Marvin Betts. Defendant and Riggs each testified that they did not know Betts, that Betts had not been in the car, and that McSween had been the front seat passenger. The identity of the front seat passenger was significant for two reasons. First, it went generally to the issue of credibility. Second, if it had been Betts, who did not own the car, this fit with the prosecution's version that when defendant said "get it out" to his front seat passenger, he was referring to a gun. On the other hand, if McSween, the owner of the car, had been in the front seat, the statement "get it out" could fairly be seen as referring to the vehicle's registration and proof of insurance.

McSween died before trial and could not be called to testify. Betts had charges pending against him in another case. As part of a two-case plea agreement, Betts agreed to plead nolo contendere in the instant case to resisting and obstructing an officer and to felony-firearm, in exchange for dismissal of all other charges in the instant case and dismissal of a receiving and concealing charge (a five year offense) in his other case. In a post-trial *Ginther*<sup>1</sup> hearing, Betts testified that he did not know defendant or Riggs and that he had not been in a car with them on the night in question or any other time.<sup>2</sup> He further testified that he was walking down the street at about 11:00 p.m. when Officers Connor and Dalitz stopped him and arrested him. He testified that the only time he saw defendant was at the video arraignment on the night of the arrest. He testified that he pleaded no contest to the charges in order to obtain dismissal of the receiving and concealing charge, of which he was guilty, and the other charges in the instant case, and that he pleaded no contest rather than guilty because he would not have been able to truthfully plead guilty. He testified that his attorney recommended the plea agreement as the best deal he could get.

The jury did not hear Betts's testimony. Although defendant subpoenaed Betts to testify, when Betts arrived to testify, the trial court, concerned that the testimony could implicate Betts's privilege against self-incrimination, appointed counsel for him. After Betts had the opportunity to discuss with counsel whether to testify, Betts elected to invoke his Fifth Amendment right not to testify.

I agree with the majority that there is no error in the trial court's refusal to permit Betts to testify in light of his stated intention to assert his Fifth Amendment privilege and that there was no violation of the Confrontation Clause. However, I do find error in the prosecution's repeated reference to Betts's plea as a guilty plea. When cross-examining defendant, there were at least five references to Betts's "guilty plea." Then, during closing rebuttal argument, the prosecution argued:

And the person, one of the people that [defendant] brings in to testify in this case is Mr. Riggs, the convicted felon who pled guilty on his dope case. And

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>2</sup> This testimony is consistent with Betts's notice of alibi defense, filed almost five months prior to his plea, in which Betts indicated that he intended to argue that he was somewhere else and that he "d[id] not know the co-Defendants."

the other person in the front seat of the car from testimony elicited by Mr. Alexander was Mr. Betts who pled guilty on the gun. On the gun charges.

In fact, Betts pleaded no contest. A prosecutor may not make a statement of fact if it is unsupported by the evidence. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Defendant points out that Sergeant Murphy agreed with defense counsel's assertion that Betts pleaded no contest to the firearms charges. Accordingly, defendant is correct in asserting that the prosecutor argued a fact unsupported by the evidence. *Id.* Were this simply one reference, I might be inclined to find no prejudice, but under the circumstances, I conclude find that the repeated references prejudiced defendant. This is not simply a difference of semantics. There are legal distinctions between guilty pleas and no contest pleas and those differences may have made a difference to the jury. Furthermore, I believe that the repeated reference to the guilty plea exacerbated the lack of a limiting instruction related to Betts's invocation of his Fifth Amendment rights.

In his closing argument, the prosecutor referenced both Riggs and Betts as people that defendant had brought in to testify and who had pleaded guilty to charges in this incident:

And the person, one of the people that he brings in to testify in this case is Mr. Riggs, the convicted felon who pled guilty on his dope case. And the other person in the front seat of the car from testimony elicited by [defense counsel] was Mr. Betts who pled guilty on the gun charges.

The inference created by this pairing was that if Betts had not been the person in the front seat of the car, he would have testified and not pled guilty. This is problematic for two reasons. First, as previously noted, Betts did not plead guilty—he pled no contest. Second, the jury was not given the limiting instruction that it could not draw a negative inference from Betts's failure to testify in support of defendant's position.

[W]here a party does not produce or call a codefendant or a witness to substantiate a claim of innocence or guilt, the jury may draw an adverse inference from the absence of this evidence. A neutralizing instruction explains to the jurors that they may not draw an inference from the absence of certain witnesses or engage in speculation about the possible nature of their testimony. [*Gearns*, 457 Mich at 202-203.]

Because Betts invoked his Fifth Amendment right not to testify, defendant was entitled to have the jury instructed that it could not infer what Betts would have testified to if he had been called. Regardless of whether it was intentional, the prosecution's argument caused the pairing of Riggs's testimony with Betts's failure to testify so that, in the absence of the limiting instruction, the jury was permitted to infer that Betts's failure to testify was because he was, in fact, the person in the front seat. Considering the fact that prior to his plea, Betts had filed a notice of alibi defense that he intended to argue that he was not present and did not know defendant and Riggs, I believe that had the prosecution not been permitted to repeatedly refer to Betts's plea as a "guilty plea" and the jury been properly instructed not to make an inferences based on a lack of testimony from Betts, there is a reasonable probability that the outcome of the proceedings would have been different.

I also disagree with the majority that the trial court did not abuse its discretion when it excluded defendant's medical records related to injuries sustained in December 2000 because the records had a tendency to demonstrate that defendant was unable to run away from Officer Connor after alighting from the Taurus. The trial court excluded defendant's medical records relating to his December 2000 medical treatment for injuries he sustained as a result of gunshot wounds on the basis that the records were "too remote in time." This was an improper basis to exclude the medical records.

As a general matter, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402. MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The excluded records evidenced nerve damage to defendant's leg as well as a comminuted fracture of his femur. The records further indicated that defendant had a bullet lodged in his lower spine that, pre-surgically, resulted in "not much motor function in his leg" and evidenced that defendant had a significant spinal injury from L3-S1, including nerve damage. This evidence was clearly relevant to support defendant's contention that he could not have run, as alleged by the officers. The fact that the records were from defendant's surgery in 2000, six years prior, and did not speak to what capacity defendant had to currently run, went to the weight of the records, not their admissibility. *People v Inman*, 315 Mich 456, 465; 24 NW2d 176 (1946) (Holding that "ordinarily remoteness affects the weight, rather than the admissibility, of evidence.").

Further, the exclusion of the medical records resulted in prejudice to defendant. Although the trial court did not preclude defendant from arguing that he was physically incapable of running, or from calling an expert witness to testify regarding defendant's current medical condition and, indeed, defendant did testify and argue vehemently that he was unable to run, the exclusion of the medical records resulted in the prosecution implying that defendant was lying regarding his physical ailments because he had not produced any evidence to support them. The prosecutor argued during closing arguments:

This is a college graduate from Eastern Michigan University who attempts to hide behind his so-called disability.

Let's talk about these disabilities. I can't walk. I need a cane. Didn't have any medical testimony about that from any doctor about what his current condition was on July 25<sup>th</sup> of 2006.

Where is the medical testimony in that regard that he can't walk?

Defendant was improperly denied the opportunity to present evidence of his injury and then the prosecution used the lack of evidence based on that improper exclusion to infer that defendant was lying. Although a prosecutor does not shift the burden of proof when he comments on the lack of evidence to support a defense theory, *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), I would find that, because the evidence was improperly excluded, the prosecutor's argument that the lack of such evidence supported its case resulted in a miscarriage of justice and defendant being denied his right to a fair trial, such that remand for a new trial is necessary. MCL 769.26.

Finally, I conclude that the trial court improperly abused its discretion when it sustained the prosecution's objection to questions to Sergeant Murphy regarding whether there was any evidence that defendant owned the gun that was recovered from the Taurus following defendant's arrest.

Although ownership is not an element of CCW or felony-firearm, the fact that defendant did not own the firearm had a tendency to show that the prosecution's contention that defendant possessed the firearm was less probable than it would be without the evidence.<sup>3</sup> The jury was informed that the weapon was "a stolen gun out of another jurisdiction" and that it was registered to one Brian Andrew Slick in northern Oakland County. However, the fact that the gun was registered to someone else and reported stolen, in the absence of the ability to provide evidence to the jury that the gun had never been traced to defendant, did not prevent the jury from inferring that defendant was the person who stole it. Accordingly, the trial court should have permitted defense counsel to elicit whether there was any "trace ownership" of the weapon to defendant.

Based on these errors, I would vacate defendant's convictions and remand for a new trial.

/s/ Douglas B. Shapiro

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<sup>3</sup> It is true that defendant's lack of ownership could not *prove* that he was not in possession, because possession does not require ownership. It does, however, tend to make it less likely and is, therefore, relevant. MRE 401.